APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD F. WILLS, JR., Petitioner-Appellant, vs. E.K. MCDANIEL and FRANKIE SUE DEL PAPA, Respondents-Appellees.	Case No. 99-15623 D.C. No. CV-N-98-00315-DWH MEMORANDUM[1]

Appeal from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding

Submitted August 10, 1999[2]

Before: BROWNING, SCHROEDER, and PREGERSON, Circuit Judges.

Nevada state prisoner Edward F. Wills, Jr. appeals pro se the district court's dismissal of his 28 U.S.C. § 2254 petition. We have jurisdiction pursuant to 28 U.S.C. § 2253(a), and we reverse and remand.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. R. 34(a)(2).

On January 7, 1999, the district court dismissed the instant petition—Wills' third federal habeas petition—as a successive petition filed without prior authorization from this court as required by 28 U.S.C. § 2244(b)(3). Wills subsequently filed a request in this court for permission to file a successive petition, along with a separate request for a certificate of appealability of the district court's January 7, 1999 order.

On April 22, 1999, a motions panel of this court denied as unnecessary Wills' request to file a successive petition because the claim raised in the instant petition was dismissed as unexhausted by this court in *Wills v. Deeds*, No. 91-16902, 1994 WL 521197 (9th Cir. Sept. 23, 1994), a prior appeal. On May 27, 1999, this court granted Wills' request for a certificate of appealability as to whether the district court erred by dismissing Wills' instant section 2254 petition as successive, and took judicial notice of its April 22, 1999 order.

Because the claim Wills seeks to raise under *Sandstrom v. Montana*, 442 U.S. 510 (1979) was previously dismissed by this court for failure to exhaust in 1994,[3] *see Wills v. Deeds*,

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[3] Respondents dispute the determination that the instant petition is not successive on the grounds that Wills' first habeas petition was denied on the merits in 1991. *See Wills v. Whitley*, No. 90-15159, 1991 WL 30375 (9th Cir. Mar. 7, 1991). This court, however, explicitly rejected this argument with regard to the *Sandstrom*

No. 91-16902, 1994 WL 521197 at **2, that claim is not successive and did not require circuit authorization to be presented to the district court in a new habeas corpus petition. *See In re Turner*, 101 F.3d 1323 (9th Cir. 1997) (holding that requirements for filing second or successive petition do not apply to subsequent petitions where earlier petition dismissed for failure to exhaust).

Accordingly, we reverse the district court's dismissal and remand so that Wills' section 2254 petition may go forward.

REVERSED AND REMANDED.

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claim in *Wills v. Deeds*, No. 91-16902, 1994 WL 521197 (9th Cir. Sept. 23, 1994) (reversing district court's dismissal of Wills' second habeas petition for abuse of the writ, and remanding for dismissal without prejudice for failure to exhaust state remedies).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

EDWARD F. WILLS,

Petitioner,

Case No. CV-N-
98-315-DWH(RAM)

vs

E.K. McDANIEL, *et al*,

ORDER

Respondents. /

Petitioner (Wills) has submitted a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondents have moved to dismiss the petition (#9) because this court lacks jurisdiction under 28 U.S.C. § 2244(b)(3)(A). Wills opposes the motion (#13) and Respondents reply (#16).

In 1987 Wills filed his first federal habeas corpus petition. *See Wills v. Whitley*, CV-N-87-109-ECR. This action was decided on the merits and the dismissal was upheld by the court of appeals. *Wills v. Whitley*, No. 90-15159 (9th Cir. 1991). In 1989, Wills brought a second federal habeas petition which was also decided on the merits. *See Wills v. Deeds*, CV-N-89-812-DHM(PHA). On appeal, the Ninth Circuit directed the district court to dismiss the petition without prejudice for failure to exhaust state court

remedies. *Will v. Deeds*, No. 91-16902 (9th Cir. 1994). Wills now brings the instant petition.

Under the provisions of the Anti-terrorism and Effective Death Penalty Act (AEDPA), "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. 28 U.S.C. § 2244(a)(3)(A). As petitioner admits, no such authorization has been obtained for this petition. Wills contends that no such authorization should be required as this is a continuation of the previously dismissed 1989 petition which was dismissed without prejudice for failure to exhaust. Relying on the decision of *Stewart v. Martinez-Villareal*, 118 S.Ct. 1618 (1998), Wills argues that the AEDPA does not apply to the renewal or continuation of an action commenced prior to its enactment. This reliance is misplaced, however. In *Stewart v. Martinez-Villareal*, the Supreme Court upheld the Ninth Circuit decision that a claim brought in an earlier petition which was dismissed as premature could be renewed to the district court without prior authorization from the appeals court. Martinez-Villareal had raised a *Ford v. Wainright*, competency

claim in his original petition.[1] The district court dismissed the claim as premature because Martinez-Villareal was not set for imminent execution and the claim was, therefore, unripe. A claim that is premature is not equivalent to one that is unexhausted.

Recently, in *Ortiz v. Stewart*, 149 F.3d 923 (9th Cir. 1998), the court of appeals upheld the application of the AEDPA to persons who had filed a first petition for writ of habeas corpus prior to the enactment of 28 U.S.C. § 2244. The court stated that the,

> AEDPA provides that a prisoner seeking habeas corpus relief must enumerate all of the grounds for such relief in his first petition in federal court, unless his claim fits within one of several statutory exceptions. See 28 U.S.C. § 2244(b)(2). This court recently decided that *Lackey* claims do not fit into any of these statutory exceptions and that they consequently are barred by AEDPA.[2] *See Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998). Because Ortiz did not raise his *Lackey* claim in his first habeas petition, which was filed, as amended, in 1986, we are compelled by *Ceja* to reject it.

This language clearly indicates the Ninth Circuit's decision that AEDPA shall apply to petitions filed prior to its enactment, barring

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[1] *Ford v. Wainright*, 477 U.S. 399 (1986) held that the Eighth Amendment prohibits a state from "inflicting the penalty of death upon a prisoner who is insane." Competency to be executed can only be determined at a time when execution is imminent.

[2] *Lackey v. Texas*, 514 U.S. 1045 (1995) (Steven, J., dissenting from denial of certiorari). *Lackey* addressed the claim that it is cruel and unusual punishment to incarcerate someone under a sentence of death for an extended length of time.

successive petitions absent permission from the court of appeals. As a result, this petition shall be dismissed.

Counsel for Wills seeks the court's clarification as to the scope of her representation in this matter. The court had previously granted Wills' motion for appointment of counsel, appointing the federal public defender to represent Wills "in the case" (#5). A conflict was identified and CJA counsel was appointed. This appointment encompasses the entire case, however, since the action is being dismissed for lack of jurisdiction, the appointment will end with the case dismissal.

IT IS THEREFORE **ORDERED** that the motion to dismiss (#9) is **GRANTED**. The petition is dismissed for lack of jurisdiction. This clerk shall enter judgment accordingly.

Dated this 5th day of January, 1999.

DAVID W. HAGEN
UNITED STATES DISTRICT JUDGE

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD F. WILLS	)	Case No. 91-16902
	)	D.C. No. CV-
Petitioner - Appellant	)	89-00812-HDM
	)	
v.	)	
	)	**MEMORANDUM***
GEORGE DEEDS, Warden	)	
	)	
Respondent - Appellee	)	
	)	

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding
Argued and Submitted September 18, 1992
Submission Withdrawn November 20, 1992
Resubmitted December 8, 1993
San Francisco, California

Before: SCHROEDER, NORRIS, and BRUNETTI, Circuit Judges

BACKGROUND

Wills was convicted in 1976 on two counts of murder. On direct appeal, he challenged the sufficiency of the evidence to

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

sustain the indictment and the conviction. In 1977, the Nevada Supreme Court affirmed the conviction.

In 1983, Wills filed his first state habeas petition, which included for the first time an allegation that two of his jury instructions violated Sandstrom v. Montana, 442 U.S. 510 (1979), by improperly shifting the burden of proof on the element of intent from the prosecution to the defense. Sandstrom was decided two years after Wills had finished his direct appeal. The Nevada state district court denied the petition, ruling that Will has waived his Sandstrom claim by failing to raise it on direct appeal. Wills then appealed the denial of his petition to the Nevada Supreme Court, but his attorney did not include the Sandstrom claim in the appeal. In 1986, the Nevada Supreme Court affirmed the denial of Wills' petition.

In 1987, Wills filed his first federal habeas petition, but did not include his Sandstrom claim. We affirmed the district court's denial of the petition.

In 1989, Wills filed a second state habeas petition, which did raise the Sandstrom claim. Wills filed this petition directly with the Nevada Supreme Court, which dismissed the petition without prejudice, stating that petitioner could file his petition in the state

district court and could then appeal an adverse ruling to the state supreme court.

Rather than filing his petition in the appropriate state district court, Wills filed a second federal habeas petition, raising the Sandstrom claim and an ineffective assistance claim based on his counsel's failure to appeal the Sandstrom claim to the Nevada Supreme Court in his first state habeas petition. The federal district court adopted the U.S. magistrate's recommendation that the second federal petition constituted an abuse of the writ because Wills had not shown cause and prejudice for his failure to raise the Sandstrom issue in his first federal habeas petition. See McCleskey v. Zant, 499 U.S. 467 (1991).

DISCUSSION

This case involves a number of complex and significant procedural questions and substantive legal and factual issues. These include whether Wills' Sandstrom claim is procedurally barred due to his failure to raise it on direct appeal; whether Sandstrom applies retroactively under Teague v. Lane, 489 U.S. 288 (1989); whether the challenged jury instructions violate Sandstrom; and whether the failure of Wills' counsel to appeal the Sandstrom claim to the Nevada Supreme Court amounts to

ineffective assistance of counsel. However, we decline to reach these issues because we hold that Wills has failed to exhaust his state remedies.

Habeas corpus litigants must exhaust all available state remedies before their petition can be heard in federal court. 28 U.S.C. § 2254(b); Rose v. Lundy, 455 U.S. 509, 518-22 (1982); McQuown v. McCartney, 795 F.2d 807, 809 (9th Cir. 1986). This requirement is a matter of comity. Sweet v. Cupp, 640 F.2d 233, 236 (9th Cir. 1981).

A petitioner has exhausted state remedies if he has presented his claim to the highest state court and that court has disposed of the claim on the merits, or if state remedies are unavailabie or inadequate. See McQuown, 795 F.2d at 809. there has been no exhaustion in this case. Here, the Nevada Supreme Court carefully avoided reaching the merits of Wills' second state habeas petition by dismissing it without prejudice so that he could file it in the appropriate state district court.

Wills himself concedes that he has not "technically 'exhausted'" his claims. Wills Supp. Br. at 23. He argues, however, that interests of futility, comity, and federalism would be best served if we reach the merits of his claims. See Granberry v.

Greer, 481 U.S. 129, 135 (1987). We disagree. Interests of comity and federalism tip sharply in favor of returning this petition to the Nevada courts so that Wills can follow the dictates of the Nevada Supreme Court and file his petition in the appropriate state district court.[1]

Accordingly, we reverse the district court's order denying Wills' petition as an abuse of the writ and remand this case to the district court with instructions to dismiss the petition for failure to exhaust state remedies.

REVERSED AND REMANDED.

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[1] For this reason, we dismiss this petition without prejudice despite the State's failure to raise a non-exhaustion objection in its motion to dismiss this petition. See Granberry, 481 U.S. at 134-35 (federal court has discretion, for reasons of "comity and judicial efficiency," to "insist on complete exhaustion" even if the State has neglected to raise a non-exhaustion defense in its answer to the petition).

Wills v. Deeds, No. 91-16902

BRUNETTI, Circuit Judge, dissenting:

I believe that the district court correctly dismissed Wills' petition for habeas corpus as an abuse of the writ. Petitioner has presented absolutely nothing to suggest that he could satisfy the cause and prejudice standard of McCleskey v. Zant, 499 U.S. 467, 493 (1991), so as to excuse his failure to raise this Sandstrom claim in his first federal habeas petition. The majority's approach to this case sidesteps the Supreme Court's clear direction in McCleskey, 499 U.S. at 486-96, and could permit Wills to raise his meritless claim in yet another federal habeas proceeding. See Campbell v. Blodgett, 997 F.2d 512, 519-20 (9th Cir. 1992), cert. denied, 114 S. Ct. 1337 (1994).

Even if the state of 9th Circuit law at the time of Wills' first federal habeas petition in 1987, see Tannehill v. Fitzharris, 451 F.2d 1322, 1323 (9th Cir. 1971), but see Campbell, 997 F.2d at 520 & n.5 (rule of McCleskey applies to pending habeas petitions); Harris v. Vasquez, 949 F.2d 1497, 1512 (9th Cir. 1990) (as amended) (same), cert. denied, 112 S. Ct. 1275 (1992), sufficed to remove Wills from the confines of McCleskey, I believe he would still have abused the writ by bringing his perennially unexhausted

Sandstrom claim in a second federal habeas petition. Wills cannot have it both ways; his failure to exhaust this claim cannot constitute cause for its absence from his first petition without creating a penalty for his waste of the federal courts' time on this second petition when he has still failed to pursue his state remedies.

The majority notes that the state has failed to raise and thus may have waived a non-exhaustion objection to Wills' second petition, and then looks to Granberry v. Greer, 481 U.S. 129 (1987), as justification for dismissing the petition without prejudice. Yet Granberry did not involve a successive petition. While resort to equitable principles such as waiver is certainly appropriate in habeas corpus, see Sanders v. United States, 373 U.S. 1, 17-18 (1963), among those principles is the notion that "a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." Id. (internal quotation and citation omitted). As the Court continued in Sanders, "[n]othing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation." I thus believe that we should affirm the district court.

Moreover, given the frailty of Wills' Sandstrom claim in the face of Teague v. Lane, 498 U.S. 288 (1989), Granberry's focus on serving "the interests of the petitioner, the warden, the state

attorney general, the state courts, and the federal courts," 481 U.S. at 135, at least counsels us to dismiss Wills' petition on substantive grounds. Wills has played hopscotch with the habeas corpus process, preventing the state judgment from achieving the finality that is "[o]ne of the law's very objects." McCleskey, 499 U.S. at 491. We should put a speedy end to his abuse of the courts' scarce resources and the concomitant frustration of both the state's sovereign power to punish Wills for his crimes and its good-faith attempts to honor his constitutional rights. Id.

I must respectfully dissent.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD FRANCIS WILLS Petitioner-Appellant, v. HAROL L. WHITLEY, Warden Nevada State Prison; the State of Nevada, Respondents-Appellees.	)	Case No. 90-15159 D.C. No. CV-87-109-ECR **MEMORANDUM***

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, Jr., District Judge, Presiding

Submitted February 22, 1991**

Before: SNEED, REINHARDT, and O'SCANNLAIN, Circuit Judges

Edward Wills, a Nevada state prisoner, appeals pro se the district court's denial of his petition for habeas corpus. Wills was convicted of murder for his role in aiding and abetting Julius

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit rule 36-3.

** The panel unanimously finds this case appropriate for submission without oral argument pursuant to Ninth Circuit rule 34-4 and Fed.R.App.P. 34(a).

Neuschafer, Jr. in the slaying of two teenage girls. After his conviction, Wills filed a direct appeal to the Nevada Supreme Court challenging the sufficiency of the evidence at his trial. The Supreme Court affirmed his conviction. Wills v. State, 93 Nev. 443 (1977).

In 1984, Wills filed a state habeas petition which alleged that he received ineffective assistance of counsel at trial and that the state failed to convict him for the crimes charged in the indictment. After denial of the petition by the state court, the Supreme Court found that the indictment was sufficient and that the claim of ineffective assistance of counsel was procedurally barred due to laches.

Wills then filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition, he raised all three of the issues that had previously been before the Nevada Supreme Court. The district court dismissed Wills' petition with prejudice, finding that both the indictment and the evidence were sufficient and that the ineffective assistance of counsel claim was procedurally barred from review. We affirm.

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. . .

STANDARD OF REVIEW

Since the highest state court has ruled on all the issues raised in his petition, Wills has exhausted his state remedies on these matters. McQuown v. McCartney, 795 F.2d 807, 809 (9th Cir. 1989). We review the district court's dismissal of the claims on the merits de novo. Barker v. Estelle, 913 F.2d 1433, 1437 (9th Cir. 1990). However, we are precluded from hearing the procedurally barred claim unless Wills can show "cause and prejudice." See Wainwright v. Sykes, 433 U.S. 72 (1977); Tacho v. Martinez, 862 F.2d 1376, 1378 (9th Cir. 1988).

DISCUSSION

The Nevada Supreme Court found that Wills' seven year delay in raising his ineffective assistance of counsel claim unduly prejudiced the state and should be barred under statutory time limitations.[1] Wills attempts to show "cause" be asserting that his transfer to New Mexico during the year following his conviction and the "lock-down" status of the Nevada prison upon his return prevented him from obtaining access to legal materials and resources necessary for him to timely file his state habeas petition. The record shows that Wills had access to state habeas forms, that

[1] N.R.S. § 38.400 provides that a rebuttable presumption of prejudice arises when a claimant fails to raise a claim within a five year period.

he filed a petition for federal habeas corpus relief, and that he had contact with an attorney hired by his family prior to the state procedural deadline. We therefore conclude that the district court properly refused to consider this claim on the ground that Wills has not demonstrated sufficient cause for his state procedural default.

Wills also contends that the State failed to convict him for the charges contained in the indictment. Nevada law allows for an aider and abettor to be charged as a principal.[2] This law was interpreted by the Nevada Supreme Court in McWilliams v. State, 87 Nev. 302, 46 P.2d 41 (1971), which found that charging a person as a principal in an indictment was sufficient notice of the charges to lead to a conviction for aiding and abetting. Since this is the law that was in effect at the time of his conviction, the indictment was sufficient.[3]

With respect to the sufficiency of evidence claim, the record shows that there is ample evidence upon which to sustain Wills' conviction as an aider and abettor. For insufficiency of the

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[2] N.R.S. 195.020 states the following: "Principals. Every person concerned in the commission of a felony ..., whether he directly commits the act ... or aids and abets in its commission ... shall be proceeded against and punished as such."

[3] In 1983, the Nevada Supreme Court overturned McWilliams, finding it necessary for the indictment to make a specific charge of aiding and abetting. Barren v. State, 99 Nev. 661, 669 P.2d 725 (1983). In its order dismissing Wills' appeal, the Nevada Supreme Court expressly held that Barren would not be applied retroactively. Order Dismissing Appeal (CR, exhibit 1), at 2.

evidence to be a grounds for reversal, we must determine whether any rational trier of fact could have found him guilty with the evidence presented at trial, viewing the evidence in the light most favorable to the prosecution. Jackson v. Virginia, 433 U.S. 307, 319 (1979).[4]

The prosecution introduced the following evidence at trial. Wills drove the car to the murder scene, helped destroy evidence of the crimes and boasted to others that "we killed some people." Before Neuschafer left to kill the first victim, he handed Wills a knife and told him "to get rid of" the other girl. Although he did not actually follow through on Neuschafer's instructions, Wills, knowing that Neuschafer intended to kill one of the girls, remained with the other girl and accompanied Neuschafer when he murdered the second victim. Thereafter, he remained in Neuschafer's company for several days, cooperated fully in destroying evidence of the crime and later told friends that "we killed some people."

Under Nevada statutes, it is necessary to show only that the crime has been committed, and that the defendant, if present, aided and assisted in the commission of the crime. See Austin v. State,

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[4] N.R.S. § 195.020 states that a person is a principal to a crime if he "aids and abets in its commission, whether present or absent; and ... directly or indirectly ... encourages another to commit a felony."

87 Nev. 578, 586, 491 P.2d 724 (1971); Harley v. State, 85 Nev. 154, 159, 451 P.2d 852 (1969). We agree with the Nevada Supreme Court, see Wills v. State, 93 Nev. 443, 566 P.2d 1138 (1977), and the district court below that there was ample evidence that Wills aided and assisted in the commission of the crime. Wills' assertion that he was an involuntary participant merely conflicts with the prosecution's evidence; the determination of which party's evidence is more credible falls within the province of the jury.

Accordingly, we conclude that the district court did not err in finding that the evidence and indictment were sufficient and that the ineffective assistance of counsel claim was barred by procedural default. The decision of the district court is therefore

AFFIRMED.

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EDWARD F. WILLS,	)	Case No. CV-N-98-315-DWH(RAM)
Petitioner,	)	
vs.	)	ORDER
E.K. MCDANIEL, *et al.*,	)	
Respondents.	)	

Petitioner Edward F. Wills has filed a notice of appeal from the decision of this court granting respondents' motion to dismiss his petition for writ of habeas corpus. Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, the notice of appeal will also be considered as a request for issuance of a certificate of appealability. A certificate of appealability should be issued only where the appeal presents a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. 2253(c).

Wills previously filed two federal habeas corpus petitions which were decided on the merits (CV-N-87-109-ECR and CV-N-89-812-HDM(PHA). Pursuant to 28 U.S.C. § 2244(a)(3)(A), "[b]efore a second or successive application permitted by this

section is filed in the district court, the applicant shall move the appropriate court of appeals for an order authorizing the district court to consider the application." In the instant case, Wills did not receive authorization from the Ninth Circuit Court of Appeals before filing the instant petition. As a result, this court dismissed his petition for lack of jurisdiction.

IT IS THEREFORE **ORDERED** that Wills' request for certificate of appealability is DENIED.

Dated this 26th day of February, 1999.

DAVID W. HAGEN
UNITED STATES DISTRICT JUDGE

APPENDIX F

Edward F. Wills, #12394
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301

Petitioner proceeding Pro Se.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

EDWARD F. WILLS,

Petitioner,

-vs-

E.K. McDANIEL, et al.,

Respondents.

/

Case No. CV-N-98-315-DWH(RAM)

APPLICATION FOR CERTIFICATE OF APPEALABILITY

The petitioner, Edward F. Wills, hereby makes this application for certificate of appealability, pursuant to section 2253(c), to this Court for the issuance of the certificate following this Court's Order dismissing the Petition for writ of habeas corpus for lack of jurisdiction.

FACTS

Petitioner, Edward F. Wills, filed the instant petition pursuant to 28 U.S.C. 2254. The respondent then filed a Motion to

dismiss claiming this court lacked jurisdiction over the petition. Petitioner opposed the motion. On January 5th, 1999, this court entered an order dismissing the petition for lack of jurisdiction.

POINTS AND AUTHORITIES

A certificate of appealability is appropriate where a petitioner can show a "substantial showing of a denial of a federal right." See, Lynch v. Blodgett, 999 F.2d 401, at 403 (9th Cir 1993). To satisfy the "substantial showing" standard, a petitioner "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." Barefoot v. Estelle, 103 S.Ct. 3395, n. #4.

In the instant case, there are numerous appellate issues that are debatable among jurists of reason. Herein, petitioner presents a number of appellate issues.

1. It is at least debatable among jurists of reason that this Court errored when it concluded erroneously, in a finding of fact, that the second habeas petition was decided on the merits, when in fact it had been dismissed as an abuse of the writ. This is crucial because a petition cannot be successive unless the issues raised were decided on the merits. Also, clearly stated in the order,

is the statement that the "petition is an abuse of the writ". This finding of fact was erroneous and could be construed as an abuse of discretion under Neuschafer v. Whitley, 860 F.2d 1470 (9th Cir. 1988).

2. It is at least debatable among jurists of reason that this court made an erroneous conclusion of law, reversible under Neuschafer, when it concluded that the petitioner, whose claims contained in the instant petition had been dismissed without prejudice for failure to exhaust state remedies, was required to seek prior permission before filing the instant petition. This conclusion is clearly erroneous in light of In Re Turner, 101 F.3d 1323 (9th Cir. 1996) (permission to file a subsequent petition under Anti-Terrorism Act not required where first petition was dismissed for failure to exhaust state remedies).

CONCLUSION

Because there exists in this case issues that are debatable, Wills respectfully requests that this Court issue a Certificate of Appealability so that his appeal may proceed.

Dated this 19th day of January, 1999.

EDWARD F. WILLS
Edward F. Wills, #12394

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Application for Certificate of Appealability was mailed to:

(Pursuant to F.R.C.P. Rule 5(b))

David K. Neidert
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

on this 19th day of January, 1999.

EDWARD F. WILLS
Edward F. Wills, #12394

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD F. WILLS, JR., Petitioner-Appellant, v. E. K. MCDANIEL and FRANKIE SUE DEL PAPA, Respondents-Appellees.	No. 99-15623 DC# CV-98-00315-DWH ORDER

Before: FERNANDEZ, W. FLETCHER, Circuit Judges.

The request for a certificate of appealability is granted with respect to the following issue: whether the district court erred by concluding that petitioner's 28 U.S.C. § 2254 petition was successive. *See* 28 U.S.C. § 2253(c)(2). Appellant's request that this court take judicial notice of its prior order, which declared the petition was not successive, is granted. *See In re Wills*, No. 95-80376 (9th Cir. Apr. 22, 1999) (order denying petition for permission to file successive habeas corpus petition as unnecessary)

Within 14 days of the filing date of this order, respondents shall file a statement of nonopposition to summary reversal or show

cause why this court should not reverse and remand this matter to allow the petition to go forward. Appellant may respond within 10 days after service of respondent's statement or memorandum.

If respondents do not comply with this order, the appeal will be referred to a motions panel for summary disposition. *See* 9th Cir. Rule 3-6.

Appellant is granted leave to proceed in forma pauperis.

APPENDIX H

FRANKIE SUE DEL PAPA
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD F. WILLS, JR., Petitioner-Appellant, v. E. K. McDANIEL, *et al.*, Respondents-Appellees.	No. 99-15623 D.C. No. CV-N 98-315-DWH **RESPONSE TO COURT ORDER FILED MAY 27, 1999**

Respondents, by and through counsel, FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, and DAVID K. NEIDERT, Deputy Attorney General, respectfully respond to this Court's Order directing Respondents to either file a statement of nonopposition to summary reversal or to show cause why this Court

should not reverse and remand this matter so that Petitioner EDWARD F. WILLS, JR. ("Wills") might go forward with his Petition.

POINTS AND AUTHORITIES

Under the Anti-terrorism and Effective Death Penalty Act (AEDPA), Congress decreed that before "a second or successive application permitted by this section is filed in the district court, the applicant *shall* move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A) (emphasis added).

In this case, Wills has had a prior adjudication of a federal habeas corpus petition on the merits. *Wills v. Whitley*, CV-N-87-1090-ECR, *aff'd*, No. 90-15159 (9th Cir. 1991) (*Wills I*). This Court can take judicial notice of its own prior proceeding. *Calderon v. United States District Court (Hill)*, 120 F.3d 927, 928 (9th Cir. 1997).

Subsequently, Wills sought a second petition for a writ of habeas corpus in federal court. *Wills v. Deeds*, CV-N-89-812-HDM(PHA), *rev'd and ordered dismissed*, No. 91-16902 (9th Cir. 1994) (*Wills II*). *Wills II* was reversed and the petition ordered dismissed without prejudice because it contained unexhausted

claims. However, this second petition does not change in any way the fact that Wills has had a prior adjudication on the merits of a federal habeas corpus petition. Thus, 28 U.S.C. § 2244(2) applies to this petition.

Respondents acknowledge that if *Wills II* were the *only* prior petition, Wills' current petition would not be a "second or successive petition" under the AEDPA. *In re Turner*, 101 F.3d 1323, 1323 (9th Cir. 1996). However, *Wills I* did include a prior adjudication on the merits. Had the AEDPA been in effect at the time Wills filed *Wills II*, he would have needed permission from this Court in order for the petition to be considered. There is no case authority that the successive petition requirements of 28 U.S.C. § 2244(b)(3) do not apply to petitioners like Wills who had a prior petition decided on the merits and had a subsequent, pre-AEDPA petition dismissed without prejudice.

Indeed, this year the Second Circuit concluded that the AEDPA applied to petitions filed after the AEDPA's effective date, regardless of when a prior petition was filed. *Mancuso v. Herbert*, 166 F.3d 97, 101 (2nd Cir. 1999). By logical extension, 28 U.S.C.

§ 2244(b)(3) applies to this action, and Wills needed permission from this Court to file a successive petition.[1]

Additionally, the First Circuit has noted that for purposes of defining a "second or successive petition" under the AEDPA, an abuse of the writ analysis is used. *United States v. Barrett*, 1999 U.S. App. Lexis 10926 (1st Cir., May 27, 1999) (collecting cases). Since Wills' current petition would be "abusive" under that standard because he has had a prior petition adjudicated on the merits (*Wills I*), then the petition which Judge Hagen dismissed for lack of jurisdiction is clearly "successive."

The other exception for not requiring permission to file a successive petition does not apply. *See Stewart v. Martinez-Villareal*, 118 S.Ct. 1618, 1621 (1998) (the AEDPA successive petition rule does not apply to issues which were not ripe at time of filing first petition). All of the claims which Wills seeks to raise now were known to him at the time he filed his second federal habeas corpus petition. As the United States District Judge who dismissed Wills' petition in 1991 found, "The record clearly establishes that the petitioner knew of the issues regarding the

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[1] Respondents acknowledge that the Motions Panel of this Court has ruled that Wills did not need permission to file a successive petition. Respondents have filed a Motion to Reconsider that ruling. Respondents ask this Court to take judicial notice of that pleading.

validity of the jury instructions at the time he filed his first federal habeas corpus petition." *See* Wills' Exh. E, p. 1.

Certainly, this Court is empowered to grant permission for Wills to file a successive petition if Wills can "make a *prima facie* showing" that he can satisfy 28 U.S.C. § 2244(b). However, the fact remains that Wills had a prior petition denied on the merits and his current claims would be subject to dismissal as an abuse of the writ. As a result, summary reversal is unwarranted since the United States District Judge was clearly correct in dismissing the petition for lack of jurisdiction.

RESPECTFULLY SUBMITTED this 4th day of June, 1999.

FRANKIE SUE DEL PAPA
Attorney General

By: DAVID K. NEIDERT
DAVID K. NEIDERT
Deputy Attorney General

CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 4th day of June, 1999, I served a copy of the foregoing RESPONSE TO COURT ORDER FILED MAY 27, 1999, by placing said document in the U.S. Mail, postage prepaid, addressed to:

EDWARD F. WILLS, JR. (#12394)
Ely State Prison
Post Office Box 1989
Ely, Nevada 89301

DORENE A. WRIGHT